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No. 185

IN THE

Supreme Court of the United States

..... Term, 19....

FARA INVESTORS, INC.,

Petitioner,

v.

MORRIS LOURIE, LENA GLANTZ and JOSEPH BORNHOLZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above-entitled case on June 28, 1951 by order of the Supreme Court of the State of New York making the judgment of the Court of Appeals the judgment of the State Supreme Court.

Opinions Below

The opinion of the Supreme Court of the State of New York, County of Bronx is contained in the written decision

of the Court dated June 26, 1950 (R., fols. 107-111), and is unreported. On April 12, 1951, the Court of Appeals of the State of New York unanimously affirmed the judgment of the Supreme Court, without opinion. Its decision is reported in 302 N. Y. 730, 98 N. E. 2d 704.

Jurisdiction

The constitutional issue before this Court was first raised in the petitioner's complaint filed June 25, 1949 in the Supreme Court of the State of New York, County of Bronx (R., fols. 22-85). That Supreme Court denied the respondents' motion to dismiss for lack of jurisdiction. (Decision reported in New York Law Journal, January 16, 1950, p. 1283.) The State Supreme Court decided after trial and argument that Section 203(b) of the Housing and Rent Act of 1949 was not unconstitutional (R., fols. 107-111). Judgment was entered in favor of the respondents on August 10, 1950, dismissing the petitioner's complaint on the merits on the sole ground that the statute was not unconstitutional (R., fols. 13-18). By notice of appeal dated August 21, 1950, the petitioner appealed from said judgment as of right pursuant to Section 588(4) of the New York Civil Practice Act to the Court of Appeals of the State of New York, relying solely upon the question of the constitutionality of the statute under the Fifth Amendment to the Federal Constitution (R., fols. 7-12). The Court of Appeals held that the statute was not unconstitutional as violative of the Fifth Amendment to the Federal Constitution (R., App., p. 4), and unanimously affirmed the judgment of the State Supreme Court, without opinion on April 12, 1951 (R., App., p. 2).

Section 1257 of the United States Code (28 U. S. C. 1257 (3)) establishes the jurisdiction of this Court to review by

Writ of Certiorari the final judgment of the Court of Appeals of the State of New York, in that there has been drawn in question the validity of a Federal Statute, on the ground of its being repugnant to the Constitution of the United States, and that the final judgment here sought to be reviewed, of the Court of Appeals of the State of New York, that being the highest Court of Record and Court of last resort of said State in which a decision in this cause could be had, is based squarely and solely upon the merits of the constitutional issue presented, and is in favor of the validity of said Statute.

It is, moreover, the first test of the validity of the Section to reach this Court.

The cases which we believe sustain jurisdiction are, among others:

Torao Takashi v. Fish and Game Commission, 334 U. S. 410;

Brooklyn Savings Bank v. O'Neil, 324 U. S. 697.

Question Presented

Whether Section 203(b) of the Housing and Rent Act of 1949 is unconstitutional as a denial of equal protection and due process of law in violation of the Fifth Amendment to the Federal Constitution in that:

(a) its differentiation between the petitioner as a lessor of housing accommodations covered by leases which provided for rents not in excess of 15% above the former maximum rent and which expired between January 1st and March 31, 1948, and lessors of housing accommodations covered by leases which expired on or after April 1, 1948, is arbitrary, capricious and discriminatory against the petitioner, and unnecessary and unrelated to the purposes of rent control legislation; and

(b) it was enacted without specific Congressional findings of an emergency sufficient to justify recontrolling premises previously decontrolling by deliberate Act of Congress.

Statute Involved

The statute involved is Section 203(b) of the Housing and Rent Act of 1949 amending Section 204(b)(3) of the Housing and Rent Act of 1947, as amended. It provides:

> "In any case in which a valid written lease with respect to any housing accommodations was entered into and filed in accordance with the provisions of this subsection (b) as then in effect, and such lease has heretofore terminated or expired or hereafter terminates or expires, such housing accommodations shall be subject to the provisions of this title and the maximum rent for said accommodations shall be the rent set forth in said lease, plus or minus applicable individual adjustments * * *"

Statement

Petitioner is the owner of an apartment building at No. 1730 Montgomery Avenue, Borough of Bronx, City and State of New York, having acquired title thereto at foreclosure sale on January 30, 1948 (R., fol. 127). The respondents were then tenants of three separate apartments in the said building under leases made prior to November, 1947 by the petitioner's predecessor. Each such lease by its terms expired after December 31, 1948, and each had been timely and properly filed with the Office of the Housing Expediter in accordance with the Housing and Rent Act of 1947 (R., fols. 123, 132, 135). Each said lease was terminated by the judgment of foreclosure and sale entered January 5, 1948 in the Supreme Court of the State of New York, County of Bronx (R., fol. 126).

Thereafter, the petitioner made new leases at within 15% higher rentals with each of the respondents (R., fols. 128, 132-3, 137), which said leases expired by their terms no earlier than September 30, 1949, and provided for the following increased rentals: As to respondent Lourie, $68.00 per month (from $59.25); as to respondent Glantz, $72.45 (from $65.00); as to respondent Bornholz, $41.50 (from $33.50). The latter increase (approximately 20%) included additional services granted respondent Bornholz.

The Housing and Rent Act of 1947, as amended decontrolled all residental units covered by leases involving rents not in excess of 15% above the former maximum rent, and which leases terminated or expired between January 1st and March 31, 1948 (Appendix A).

The specific question of control or decontrol of the respondents' apartments under the 1947 Act, as amended, was litigated and judicially resolved as to each of them. It is therefore *res adjudicata* as to all the respondents, and was so held by the Court below, that their apartments were, in the period ending March 31, 1949, decontrolled from Federal Rent Control (R., fol. 109).

Section 203(b) of the 1949 Act recontrolled said residential units, establishing the maximum rent therefor on the basis of the 1947 leases, and 1948 leases *if filed pursuant to the Act.* The law made no provision for the filing of the new 1948 leases executed for those units covered by leases which had expired or terminated between January 1st and March 31, 1948. Such leases were not required by law to be filed. By virtue of the apartments being decontrolled, the law in effect prohibited such filing *(U. S. A. v. Porhownik,* 182 F. 2d 829, cert. den., 340 U. S. 825). Section 203(b) of the 1949 Act, in recontrolling the residential units, previously decontrolled as aforesaid, established the

maximum rent which the petitioner, and landlords similarly situated, could charge therefor on the basis of the 1947 leases.

On June 25, 1949 the petitioner commenced an action in the Supreme Court of the State of New York, County of Bronx, for a declaratory judgment declaring Section 203(b) of the 1949 Act, as applicable to the petitioner, unconstitutional as violative of the Fifth Amedment to the Constitution of the United States. The cause proceeded to judgment therein, with due regard to procedural and jurisdictional requirements. The sole issue before the Court was one of law, namely, the constitutionality of the statute here involved under the Fifth Amendment to the Federal Constitution. The Court decided in favor of the constitutionality of the statute, "* * * though it may seem unsound" (R., fol. 111). Its decision was subsequently affirmed on appeal by the Court of Appeals of the State of New York.

Reasons for Granting the Writ

This case presents a question of substance relating to the constitutionality of a section of an Act of Congress which has not heretofore been determined by this Court.

Neither the Supreme Court of the State of New York which ruled that the Statute was not unconstitutional, nor the Court of Appeals of the State of New York which affirmed the judgment without opinion cited any authority as determinative of the precise constitutional question involved.

In *U. S. v. Shoreline Cooperative Apartments, Inc.*, 338 U. S. 897, this Court did not have before it, and did not consider, nor even purport to consider this question. There the lower court had ruled (*Woods v. Shoreline*, 84 F. Supp.

660) that the local option to decontrol was not invalid, and therefore its invalidity did not invalidate the entire Act; and that to the extent that the Housing and Rent Act of 1949 was the same as the 1947 Act passed upon in *Woods v. Miller Co.*, 333 U. S. 138, it was valid. The section whose unconstitutionality the petitioner here urges was not in the 1947 Act. It appeared for the first time in the 1949 Act.

Nor is the decision in *U. S. A. v. Porhownik (supra)*, decisive of the issue involved here. The District Court there had decided that Section 204(b)(3) of the Housing and Rent Act of 1947, as amended, was direct and explicit, and applied to leases executed subsequent to January 1, 1948. It decided nothing more, as its opinion (unpublished) shows. On this record, the case was affirmed. Petitioner does not urge the contrary. The language of the statute clearly recontrols the petitioner's units. Indeed that is the burden of the petitioner's complaint. Without it, the petitioner would have no standing to urge the unconstitutionality of Section 203(b) of the Housing and Rent Act of 1949.

An authoritative decision of this question by this Court is of pressing importance not only to the petitioner, but to all landlords similarly situated.

Clearly, and aside from the novelty and importance of the issue presented, the aforesaid judgment should be reviewed for the additional reason, we submit, that it is erroneous and not in accordance with the principles of applicable decisions of this Court.

In *Markbreiter et ano. v. Woods*, 169 F. 2d 875, the United States Emergency Court of Appeals decided a question similar to the basic issue here involved. There, destruction by fire of a large apartment house in the summer resort City of Long Beach had suddenly rendered

homeless approximately one hundred families, including many veterans. By specific rent regulations all resort housing in the area had been exempted from rent control for the summer season, thus resulting in the holding of many accommodations for rental during the summer season only. In an effort to force the release of said accommodations the aforesaid rent regulation was amended to specifically exclude housing accommodations in multiple unit buildings within the City of Long Beach from the 1946 summer season exemption afforded to resort housing.

In a thorough and well-considered opinion by Maris, Ch. J., the Court declared said amendment invalid from its inception, despite the expressed purpose motivating the discrimination, because "it was unlawfully discriminatory and capricious."

Summary of Argument

Section 203(b) distinguishes between housing accommodations covered by leases filed pursuant to Section 204(b) that terminated or expired in the period January 1, 1948 to March 31, 1948 and housing accommodations covered by leases not otherwise different, that terminated on or after April 1, 1948. Since this differentiation and the necessary classification thus produced cannot be justified in any way in terms of the purpose to be achieved and are based on a distinction as fortuitous as the flip of a coin, the statute is discriminatory and violates the constitutional provisions ensuring plaintiff due process and equal protection of law.

What is at stake here is not the right of Congress to legislate for the general welfare of the people in a business which, although private, is affected with a public interest. Nor is the Court asked to set itself up as the arbiter of the

means appropriate to achieve the end sought; stabilization of rents.

The issue here is whether the Congress could capriciously single out one set of identical units for rents depressed a fixed percentage below other identical units in the same location and circumstances. Had this been done specifically and deliberately, we believe it to be clear that this Court would strike it down, as the Emergency Court of Appeals did in the case of *Markbreiter v. Woods (supra)*. That it was done by Congress perhaps by inadvertence should not save it: courts exist to correct such errors. Where the discrimination is, in fact, unnecessary to accomplish and unrelated to the purpose of the legislation, it is, we submit, that much more vulnerable to attack.

This inequality—it must be borne in mind—was not the result of free economic bargaining, (as on the original freeze date). The Congress itself had decontrolled these units. It seems the height of caprice that Congress under the Constitution should have, or indeed desire, such power. In any event, to benefit a few tenants economically (when all others in similar position all around them are not so favored) does not promote the general welfare. It is rather caprice run rampant.

Further, in the absence of specific findings of a more serious emergency, Congress had no constitutional power to recontrol premises previously decontrolled by deliberate act of Congress.

* * *

1. Section 203(b) of the Housing and Rent Act of 1949 purports to recontrol housing accommodations covered by leases entered into and filed pursuant to Section 204(b) of the Housing and Rent Act of 1947 or the said Section, as amended, at the rent set forth in said leases.

More particularly, Section 203(b) of the 1949 Act purports to recontrol the accommodations involved herein at the rentals set forth in the leases entered into in October 1947, and filed pursuant to the provisions of the Housing and Rent Act of 1947, instead of at the increased rentals set forth in the repective leases which were entered into in 1948 after the termination of the 1947 leases, and which leases, even though complying, could not have been filed pursuant to the said Act as amended because, prior filed leases having terminated before April 1, 1948, the units had become decontrolled.

Said Section 203(b) arbitrarily and capriciously discriminates against certain housing accommodations, which are not in any wise different from other housing accommodations for purposes of rent control, in establishing the maximum rent which the landlord may charge. No reasonable basis exists for the distinction between housing accommodations covered by leases filed pursuant to Section 204(b) that terminated or expired in the period January 1, 1948 to March 31, 1948, and housing accommodations covered by said leases that terminated on or after April 1, 1948. Yet, Section 203(b), in its application, necessarily makes this distinction and necessarily produces a sharp inequality in the rents that may be charged by a landlord so affected. Landlords of accommodations covered by such leases that terminated on or after April 1, 1948 could and did thereafter make leases at rents that were up to 15% above June 30, 1947 rents (as happened in the Porhownik case) *(supra);* and under Section 203(b) did and can now legally collect such rents, while the petitioner herein, and other landlords similarly situated, were prohibited from collecting and cannot now collect rents that represent like increases. And this, Congress predicated on a basis as fortuitous as the flip of a coin, *i. e.*: the chance termination of a lease between January 1, 1948 and April 1, 1948.

Section 203(b) virtually grants to certain landlords an increase up to 15% above the maximum rent established for other landlords, including petitioner, and in so doing, without a reasonable basis in fact, violates the due process guaranteed by the Fifth Amendment to the Constitution of the United States.

In addition to its general negation of due process, Section 203(b) is unconstitutional by virtue of its implicit arbitrary classification of housing accommodations for purposes of determining the maximum rent into: (1) those affected by leases that were entered into pursuant to Section 204(b) as then in effect, and terminated prior to April 1, 1948, and (2) those affected by leases entered into pursuant to Section 204(b), as then in effect, that did not so terminate prior to April 1, 1948. No possible basis in fact exists for such a distinction, nor is there a possible logical distinction when viewed in terms of purpose to be achieved. Arbitrary discrimination between members of the same class is thus substituted for classification.

There must be a real distinction with a substantial basis in fact to sustain the attempted classification.

Gulf, Colorado & Santa Fé R. Co. v. Ellis, 165 U. S. 150;

Frost v. Corporation Commission, 278 U. S. 515, 522, 524, 525.

It is only when the classification has relation to the purpose for which it is made that it does not contain the kind of discrimination against which the Equal Protection clause affords protection.

Railway Express v. New York, 336 U. S. 106;

Marcus Brown Co. v. Feldman, 256 U. S. 170;

Metropolitan v. Brownell, 294 U. S. 580.

It is submitted that the classification here complained of, is based on differences that are not related to the legislative purpose in rolling back rents. Assuming that rentals have been unjustifiably increased, in some instances, on housing accommodations included within Class (1) above, it is apparent that the rents charged herein are in effect equal to an increase of only approximately 15% above the maximum rent in effect in 1947, a standard approved by Congress itself.

Section 203(b) takes this 15% increase away from this landlord, but allows others the 15% permitted under the Housing and Rent Act of 1948. It was never presumed that an emergency rent measure that not only arbitrarily discriminated between landlords but even granted certain tenants an unwarranted economic advantage over their landlords would be justified. As pointed out by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393:

> "The protection of private property in the fifth amendment presupposes it is wanted for public use, but provides it shall not be taken for such use without compensation. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of the human nature is to extend the qualification more and more until at last private property disappears, but this cannot be accomplished in this way under the Constitution of the United States."

Nor is the presumption of constitutionality, alone, of sufficient force to rescue an unconstitutional law and catapult it to the safety-zone of constitutionality. *Borden's Farm Products Co. of Buffalo v. Baldwin*, 293 U. S. 194.

This Court is aware of the history of rent control legislation and can readily weigh the grounds, if any, for the

discrimination hereinbefore outlined. In a logical analysis of Congressional action, the unreasonableness of Section 203(b) becomes accentuated. When Congress enacted the Housing and Rent Act of 1947, it provided, by virtue of the provisions contained in Section 204(b), "a practical and essential method of accelerating decontrol" (*See* Majority Report of the House Committee on Banking and Currency, p. 12). By amendment in 1948, the accommodations here were completely decontrolled. Congress in extending the provisions of Section 204(b) in the 1948 Act, intended this to promote decontrol, as appears from the Hearings on the 1948 Extension of Rent Controls before the Committee on Banking and Currency of the House of Representatives (February 3-10, 1948). (Appendix B)

Congress was also aware that the natural concomitant of decontrol would be the adjustment of rents more in keeping with the economy of the times.

The petitioner herein, as landlord of housing accommodations that were completely decontrolled by deliberate act of Congress, now not only finds that such accommodations are recontrolled but that it is penalized by Congress because of such decontrol. Neither the nature of the statute nor the end to be obtained, warrants such capricious and discriminatory treatment.

The rationale of the decision as set forth in the following quotation, from the opinion in *Markbreiter v. Woods (Supra)* applies squarely to the case at bar.

> "These arguments seem to us to be beside the point, for they do not meet the complainants' charge of discrimination against this 'relatively small number of landlords' who, alone, of all the owners of resort housing accommodations in Long Beach, were denied the right to engage in the uncontrolled rental of their properties to summer tenants. It is true that the ad-

ministrator had authority in proper cases to decide to control the rents of certain classes of accommodations only *(Woods v. Miller Co.,* 333 U. S. 138, 1948). But in such a situation there must be a reasonable basis for the classification. * * *

"Nor is the respondent's position advanced by its argument that the amendment was justified by the increasing need of veterans for housing in Long Beach. For there is no basis for finding that this need was any different in Long Beach than in all other parts of the New York City Defense-Rental Area. It was only in Long Beach, however, that amendment 25 was made applicable. Summer resort housing in multiple-unit buildings in all the many other seashore resort towns and villages of the New York City Defense-Rental Area remained free from rent control. Thus, upon this theory there was additional discrimination against the complainants and other landlords in their class, in that they alone of all the owners of resort housing in multiple-unit buildings in the entire defense-rental area were denied the right to lease their apartments to summer tenants at uncontrolled rentals. It is settled that a regulation is invalid which unnecessarily discriminates between persons similarly situated and puts a greater burden upon some than is put upon others in the same calling and condition *(Consol. Water Power & Paper Co. v. Bowles,* 146 F. 2d 492, 495, E. C. A., 1944; *Hawaii Brewing Corp'n v. Bowles,* 148 F. 2d 846, 850, E. C. A., 1945; *Booth Fisheries Corp'n v. Bowles,* 153 F. 2d 449, 451, E. C. A., 1946)."

2. Congress in enacting the Housing and Rent Act of 1949, made no new finding of emergency nor any finding of additional or increased emergency or increased shortage of residential accommodations. 1948 was a time when peace was both hoped for and expected. And these issues relate to that time. What Congress was exercising in 1947 and 1948 was its duty to decontrol all sections of the economy from war-required restrictions based squarely and solely on its war powers. In the intra-state field of residential rents particularly, it is inconceivable that its

power rested on any other source. Hence the requirement of a finding of a specific emergency is of the utmost importance.

The Housing and Rent Act of 1949 is emergency legislation and depends for its justification upon the existence of an actual emergency commensurate with the measures adopted, as was pointed out by Holmes, J., in *Chastleton Corp. v. Sinclair*, 264 U. S. 543, at pp. 547, 548 and 549.

In the absence of an express finding by Congress that a new, or more serious emergency exists, there is no justification for upholding legislation that is arbitrary, capricious and discriminatory and that violates individual rights guaranteed by the Constitution.

Mayflower Farms, Inc. v. Ten Eyck, 297 U. S. 266, 274;
Block v. Hirsh, 256 U. S. 135.

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 3, 1951.

Appendix A

Section 204(b) of the Housing and Rent Act of 1947:

" * * * And provided further, That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section. In any case in which a maximum rent for any housing accommodations is established pursuant to the provisions of the last proviso above, such maximum rent shall not thereafter be subject to modification by any regulation or order issued under the provisions of this title. No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above shall be subject, after December 31, 1947, to any maximum rent established or maintained under the provisions of this title".

Section 202(b) of the Housing and Rent Act of 1948, amending Section 204(b)(2) of the Housing and Rent Act of 1947:

"In any case in which a landlord and tenant, on or before December 31, 1947, in accordance, with the provisions of this subsection as then in effect, voluntarily entered into a valid written lease in good faith with respect to any housing accommodations, such housing accommodations shall not be subject to any maximum rent established or maintained under the provisions of this title unless such lease is hereafter terminated or expires before March 31, 1949, * * * ".

Appendix B

Excerpt from Hearings on 1948 Extension of Rent Controls Before Committee on Banking and Currency of the House of Representatives (February 3-10, 1948), at p. 75:

(Mr. Dupree was general counsel to Tighe Woods, Housing Expediter, Mr. Fletcher a member of the Congressional Committee.)

"Mr. Dupree: I think that we reached our interpretation of this section of the act primarily from the standpoint that we felt that in our opinion Congress was primarily concerned, in passing this section of the act, with providing landlords and tenants an opportunity to bargain for an increase in rent.

Mr. Fletcher: Not necessarily. The primary purpose is stated very clearly. This is a decontrol act. This is the whole point.

Mr. Dupree: And further—and this again is our construction—where you say, 'No housing accommodation for which a maximum rent is established pursuant to the provisions of the last provision * * * ' if they do not increase the rent the maximum rent is not established pursuant to this proviso.

Mr. Fletcher: It is established by the lease, even if it is the same. The unduly prolonged controls over rents would be inconsistent with a return to a free economy. This is the whole intent.

Mr. Dupree: I will agree that that is the purpose.

Mr. Fletcher: And it was to bring the landlord and tenant together on a voluntary basis. That would be the fair test?

Mr. Dupree: Yes, sir."